Pembangunan Tanah dan Perumahan Sdn Bhd v Raja Qahaarruddin bin Raja Abdul Aziz

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(IM) (NCVC)-1902–09 OF 2018
AHMADI ASNAWI, ABDUL KARIM AND LEE SWEE SENG JJCA
18 DECEMBER 2019

Civil Procedure — Res judicata — Abuse of the court — Raja Qahaar/respondent obtained judgment in default against appellant/PTDP — Whether default judgment can be impeached in separate proceeding — Whether impeachment proceedings an attempt to relitigate the matter — Whether default judgment procured through suppression of relevant facts or fraud and deceit — Whether res judicata had set in — Whether default judgment obtained a nullity — Whether justice of the case lay in reopening issue

Following a dispute over a piece of land ('the land'), Raja Qahaarruddin bin Raja Abdul Aziz ('Raja Qahaar') had filed a writ action against Pembangunan Tanah dan Perumahan Sdn Bhd ('PTDP'). By way of this action Raja Qahaar sought a declaration that he was the lawful owner of the land or alternatively for damages in the sum of RM844,000 being the purchase price and other ancillary charges incurred in the purchase of the land. The land had already been transferred by PTDP to another purchaser. The writ of summons and statement of claim had been duly filed and served on PTDP at its registered office. However, PTDP failed to enter an appearance, and a default judgment was entered against PTDP on 16 March 2014. Default judgment was entered for the sum of RM844,000 together with interest at the rate of 5%pa from date of writ to realisation and cost of RM1,000. Thereafter, PTDP applied to set aside the default judgment but the sessions court dismissed the said application. PTDP did not appeal against the decision of the sessions court. Subsequently, Raja Qahaar proceeded with execution proceedings and applied for a prohibitory order and sale by public auction of the land, which was divided into six lots. At the sale by auction, three lots were sold. The bid price from the three auctioned lots was enough to settle the judgment sum outstanding with a balance left for PTDP. Raja Qahaar then faced a a further obstacle, when PTDP refused to deliver up the three titles to the lots auctioned. When PTDP refused to deliver up the titles to the land seized for the purpose of the execution, Raja Qahaar proceeded with a contempt action against two of its directors. Leave was granted for the contempt action and PTPD consented to deliver the original document of titles for the lots to be auctioned. On 7 December 2017, PTDP filed the present suit to impeach the default judgment, which was obtained some three years ago. PTDP also invoked the inherent jurisdiction of the court under O 92 r 4 the Rules of Court 2012 ('the

ROC 2012') and s 44 of the Evidence Act 1950 in pursuing this impeachment suit. Raja Qahaar as the defendant applied successfully for the suit to be struck out under O 18 r 19(1)(a), (1)(b), (1)(c) or (1)(d) of the ROC 2012. This was PTDP's appeal against that order on the grounds that the issue as to whether the default judgment was procured through suppression of relevant facts or fraud and deceit could only be determined at the trial of the new suit and not summarily by way of striking out. PTDP also argued that that the default judgment was a nullity, in that, in the initial suit Raja Qahaar had no cause of action against PTDP to seek liquidated damages for failure to transfer to him the land that was allegedly bought from Raja Qahaar's predecessors in title. Raja Qahaar submitted that PTDP cannot come to court after some three years have lapsed to challenge the default judgment by applying to impeach it unless new evidence has been discovered since the application to set aside. Raja Qahaar also submitted that the reasons given by PTDP in the present impeachment suit are no different from the ones already harnessed for the purpose of setting aside the default judgment.

Held, dismissing the appeal with costs of RM10,000:

(1) It is trite law that an impeachment suit is not to be launched unadvisedly and more so when there is nothing shown of fraud being practised on the court or that the defendant Raja Qahaar had misrepresented and suppressed material facts in any way. The present case is not one where there was any active concealment of any material facts or a practice of deceit on the court but rather a case where Raja Qahaar has his version of what happened and PTDP has its version. The stage to ascertain which of the two versions is right had come and gone and it is too late to re-litigate the issue by resorting to impeaching the default judgment. PTDP should not be allowed to use the backdoor way to resurrect a case that has long been concluded and closed. When Raja Qahaar had filed a suit against PTDP, the latter had not argued its case when it had the opportunity to do so and it had not appealed against the order dismissing its application to set aside the default judgment. As such, it cannot now be heard, supposedly on the higher ground of impeaching the default judgment. The Court of Appeal in *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 had addressed precisely this issue of what must be shown before a judgment could be impeached with reference to s 44 of the Evidence Act 1950. In the circumstances, PTDP should not after judgment had been taken, subsequently challenge it by impeaching the judgment, when it had failed to marshal all the available evidence at its disposal in the trial of first instance. The facts in the present case do not permit PTDP to re-litigate the issue of whether Raja Qahaar had a cause of action against it in the tracing of the ownership to the land as res judicata had set in (see paras 49–56 & 58–60).

(2) PTDP's argument that the default judgment obtained was a nullity had no merit. The instant case is not one where the sessions court had no jurisdiction or where the transaction in the subject land was prohibited by statute. Although Raja Qahaar had initially prayed for a declaration that he is the lawful owner of the subject land and for damages to be assessed, he had when entering default judgment elected not to challenge the registered title of the subsequent purchaser that had derived titled from PTDP. Instead, he had claimed damages for the wrongful transfer, as it was in complete disregard of his interest in the land. There is nothing oppressive in letting the default judgment remain as PTDP had not bothered to pursue further with the appeal or apply for extension of time to file the appeal and was only propelled into action because of the execution effected by way of a prohibitory order and a writ of seizure and sale after PTDP had refused to pay (see paras 61–63, 69–70 & 73).

(3) There must be an end to all litigation involving the same issue either because the affected party had not exercised its right of appeal or that it has exhausted all avenues of setting aside the impugned judgment or subsequent consent order. It becomes an abuse of the court's process in the face of repeated resurrecting of the same matter that had been finally concluded with no appeal from PTDP. Further, any irregularities in the recording of the default judgment, which PTDP had not shown, have been cured and both rectified and ratified by the parties with the consent order recorded in the contempt proceeding without PTDP reserving their rights to litigate further. This is not a case where the court by striking out the impeachment suit is making a final determination on what appears to be conflicting versions of ownership and title on mere affidavit evidence alone, but rather one where PTDP's claim is a complete non-starter and a strategy to keep a suit alive (see paras 81–89).

[Bahasa Malaysia summary

Berikutan pertikaian terhadap sebuah tanah ('tanah'), Raja Qahaarruddin bin Raja Abdul Aziz ('Raja Qahaar') telah memfailkan writ tindakan terhadap Pembangunan Tanah Dan Perumahan Sdn Bhd ('PTDP'). Melalui tindakan ini, Raja Qahaar telah memohon satu pengisytiharaan bahawa dia merupakan pemilik tanah yang sah atau secara alternatif ganti rugi sebanyak RM844,000 untuk harga belian dan kos-kos sampingan yang lain untuk pembelian tanah tersebut. Tanah tersebut telah dipindahmilik oleh PTDP kepada pembeli yang lain. Writ saman dan penyataan tuntutan telah difail dan diserahkan kepada PTDP di alamat berdaftarnya. Namun, PTDP gagal untuk memasukkan kehadirannya dan penghakiman ingkar telah dimasukkan terhadap PTDP pada 16 Mac 2014. Penghakiman ingkar telah dimasukkan untuk jumlah RM844,000 berserta faedah sebanyak 5% setahun dari tarikh writ pencapaian dan kos sebanyak RM1,000. Kemudiannya, PTDP telah memohon untuk membatalkan penghakiman ingkar namun mahkamah sesyen menolak

permohonan tersebut. PTDP tidak merayu terhadap keputusan mahkamah sesyen tersebut. Kemudiannya, Raja Qahaar meneruskan dengan prosiding pelaksanaan dan telah memohon untuk prohibitory order dan penjualan melalui lelongan awam untuk tanah tersebut yang telah dibahagikan kepada enam bahagian. Semasa lelongan awam tersebut, tiga bahagian telah dijual. Harga perbidaan daripada tiga bahagian yang dilelong cukup untuk menyelesaikan jumlah penghakiman tertunggak dan masih mempunyai baki untuk PTDP. Raja Qahaar kemudiannya mempunyai cabaran di mana PTDP enggan untuk menyerahkan tiga geran untuk bahagian yang telah berjaya dilelong. Apabila PTDP enggan untuk menyerahkan geran-geran untuk tanah yang telah dirampas untuk tujuan perlaksanaan, Raja Qahaar memulakan prosiding menghina mahkamah terhadap dua pengarah PTDP. Kebenaran telah diberikan terhadap tindakan penghinaan mahkamah dan PTDP telah bersetuju untuk menyerahkan geran-geran asal untuk bahagian dilelong. Pada 7 Disember 2017, PTDP telah failkan saman untuk membatalkan penghakiman ingkar yang telah diberikan tiga tahun yang lalu. PTDP juga menggunapakai bidang kuasa sedia ada mahkmamah di bawah A 92 k 4 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') dan s 44 Akta Keterangan 1950 dalam saman pembatalan tersebut. Raja Qahaar sebagai defendan telah berjaya untuk membatalkan saman tersebut di bawah A 18 k (1)(a), (1)(b), (1)(c) atau (1)(d) KKM 2012. Ini merupakan rayuan PTDP terhadap arahan tersebut atas alasan bahawa isu penghakiman ingkar telah diperolehi menerusi penindasan fakta relevan atau frod dan penipuaan yang hanya boleh ditentukan menerusi perbicaraan saman yang baharu dan bukannya diputuskan secara ringkas oleh pembatalan yang telah dibuat. PTDP juga berhujah bahawa penghakiman ingkar adalah tidak sah kerana Raja Qahaar tidak mempunyai kausa tindakan terhadap PTDP untuk memohon gantirugi yang telah ditentukan kerana gagal untuk memindah milik tanah tersebut kepada dia yang telah kononnya dibeli oleh waris Raja Qahaar. Raja Qahaar telah berhujah bahawa PTDP tidak boleh memohon kepada mahkamah setelah tiga tahun untuk mencabar penghakiman ingkar dan memohon untuk pembatalannya melainkan terdapat bahan bukti yang baru ditemui selepas permohonan pembatalan. Raja Qahaar juga berhujah bahawa alasan-alasan diberikan oleh PTDP untuk pembatalan adalah tidak berbeza daripada apa yang telah dikemukakan untuk pembatalan penghakiman ingkar.

Diputuskan, menolak rayuan dengan kos RM10,000:

(1) Ia adalah undang-undang yang jelas bahawa saman pembatalan tidak boleh dimulakan tanpa kebenaran apatah lagi tiada dapatan menunjukkan frod dilakukan di dalam mahkamah ataupun defendan Raja Qahaar telah memberikan fakta yang salah atau menindaskan fakta dalam apa-apa cara. Kes tersebut bukanlah kes di mana terdapat penyembunyian yang aktif terhadap fakta material atau penipuaan kepada mahkamah namun hanyalah kes di mana Raja Qahaar

mempunyai versinya tersendiri terhadap apa yang telah berlaku dan PTDP mempunyai versi mereka tersendiri. Masa untuk menentukan yang mana satu antara dua versi adalah merupakan yang benar telah berlalu dan adalah terlambat untuk mempertikaikan semula isu tersebut dengan melalui pembatalan penghakiman ingkar. PTDP sepatutnya tidak dibenarkan untuk menggunakan pintu belakang untuk menghidupkan semula kes yang telah lama diselesaikan dan ditutup. Apabila Raja Qahaar telah memfailkan saman terhadap PTDP, PTDP tidak berhujah akan kesnya apabila diberi peluang untuk berbuat demikian dan tidak merayu terhadap arahan pembatalan permohonannya untuk membatalkan penghakiman ingkar. Oleh itu, ia tidak boleh didengar atas alasan pembatalan penghakiman ingkar. Di dalam kes Mahkamah Rayuan *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 telah menyatakan dengan tepat isu ini iaitu apa yang perlu dikemukan sebelum penghakiman boleh dibatalkan dengan merujuk kepada s 44 Akta Keterangan 1950. Di dalam perkara ini, PTDP tidak sepatutnya selepas penghakiman diberikan mencabarnya dengan pembatalan penghakiman tersebut apabila ia telah gagal untuk menggunakan segala bukti yang ada semasa perbicaraan yang pertama. Fakta-fakta di dalam kes sekarang, tidak membenarkan PTDP untuk mempertikaikan semula isu sama ada Raja Qahaar mempunyai kausa tindakan terhadap PTDP dalam menentukan pemilikan tanah tersebut akibat daripada res judicata (lihat perenggan 49–56 & 58–60).

(2) Hujahan PTDP bahawa penghakiman ingkar tidak sah tidak mempunyai merit. Kes tersebut adalah bukan kes di mana mahkamah sesyen tidak mempunyai bidang kuasa atau transaksi berkenaan tanah adalah dilarang oleh undang-undang. Walaupun Raja Qahaar telah pada mulanya memohon untuk pengisytiharaan bahawa dia merupakan pemilik tanah yang sah dan gantirugi perlu ditentukan, semasa memasuki penghakiman ingkar dia telah memilih untuk tidak mencabar pemilikan pembeli yang berikut selepas PTDP. Namun, dia telah memohon gantirugi untuk pindahmilik yang salah yang telah berlaku yang mana tidak mempedulikan hak dia ke atas tanah tersebut. Tiada penindasan berlaku sekiranya membiarkan penghakiman ingkar kekal kerana PTDP tidak berusaha untuk meneruskan rayuan atau memohon untuk lanjutan masa untuk memfailkan rayuan dan hanya bertindak kerana perlaksanaan dilakukan melalui prohibitory order dan writ penyitaan dan penjualan selepas PTDP enggan untuk membayar (lihat perenggan 61–63, 69–70 & 73).

(3) Setiap litigasi yang membabitkan isu yang sama mestilah mempunyai pengakhiran sama ada kerana pihak yang terkesan tidak menggunakan haknya untuk merayu atau telah menggunakan segala ruang untuk pembatalan terhadap penghakiman terlibat atau perintah kebenaran selanjutnya. Ia akan menjadi salah guna kuasa proses mahkamah yang

nyata untuk mengembalikan perkara yang sama yang telah diselesaikan yang tidak dirayu oleh PTDP. Selanjutnya, perihal yang tidak teratur semasa merekodkan penghakiman ingkar, di mana PTDP gagal untuk membuktikan, telah diperbaiki dan kedua-dua telah memperbetulkan dan bersetuju untuk arahan persetujuan direkodkan di dalam prosiding penghinaan mahkamah tanpa PTDP memberikan hak kepadanya untuk apa-apa pertikaian selanjutnya. Ini bukanlah kes di mana Mahkamah dengan membatalkan saman pembatalan membuat keputusan akhir untuk apa yang dilihat sebagai konflik terhadap versi pemilikan dan hak yang berdasarkan bukti affidavit sahaja, namun lebih kepada permohonan PTDP tiada peluang untuk berjaya dan adalah strategi untuk membiarkan saman diteruskan (lihat perenggan 81–89).]

Cases referred to

Abdul Rahim bin Sinon v Pembangunan Tanah dan Perumahan Sdn Bhd and Anor [2016] 1 LNS 1079, HC (refd)

Badiaddin v Arab-Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346; [2001] 1 MLRA 98, CA (refd)

Hadi bin Hassan v Suria Records Sdn Bhd & Ors [2005] 3 MLJ 522; [2004] 8 CLJ 225, HC (refd)

Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374, FC (refd)

Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd [2013] 5 MLJ 1; [2013] 5 MLRH 175, FC (refd)

Supreme Envy Sdn Bhd v Abul Rahim bin Sinon (suing and acting as personal representative and representing the estate of Sinon bin Karnen, the deceased) & Anor [2017] 1 MLJ 43; [2016] 1 LNS 1535, CA (refd)

Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 5 MLJ 112; [2008] 1 MLRA 276, CA (refd)

Legislation referred to

Rules of Court 2012 O 13 r 6(1), O 18 r 19, O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d), O 42 r 13, O 92 r 4

Subordinate Courts Act 1948 s 65(1)(b)

Appeal from: Civil Appeal No JA-22NCVC-224–10 of 2017 (High Court, Johor Bahru)

Lua Kok Hiyong (Ummi Salhah bt Mohamad with him) (Lua & Mansor) for the appellant.

Nor Aishah bt Abdul Rahman (Faizah Aishah Rahman & Assoc) for the respondent.

Lee Swee Seng JCA (delivering judgment of the court):

[1] This appeal raised an interesting question as to whether a defendant who had failed to set aside a default judgment may later apply to impeach the said judgment on ground that it was obtained through fraud or conspiracy when the alleged fraud and conspiracy was all before the filing of the suit that led to the default judgment. It was also argued that the plaintiff in the initial suit had no cause of action against the defendant with respect to suing for liquidated damages for failure to transfer to him a piece of land bought apparently from the defendant's predecessors in title and that the default judgment was a nullity.

[2] The challenge to impeach the default judgment was made after an execution by way of a prohibitory order and sale of three pieces of the defendant's land and after a consent order had been entered into with respect to a committal action brought by the plaintiff in the initial suit in the sessions court against the directors of the defendant there. Upon the recording of the consent order the committal action against the directors of the defendant was, with leave of the court, withdrawn.

PROCEEDINGS IN THE SESSIONS COURT

[3] The current dispute over a piece of land had begun in the Sessions Court in Johor Bahru in Suit No B52-NCVC-07–02 of 2014 ('the session court suit') wherein the plaintiff there was one Raja Qahaarruddin bin Raja Abdul Aziz ('Raja Qahaar') against Pembangunan Tanah Dan Perumahan Sdn Bhd ('PTDP') for a declaration that Raja Qahaar is the lawful owner of the land in question or alternatively for damages to the tune of RM844,000 being the purchase price and other ancillary charges incurred for the purchase of the land.

[4] The land in question had already been transferred by PTDP to another purchaser.

[5] The writ of summons and statement of claim were served at the registered office of the PTDP on 25 February 2014 and the affidavit of service was duly filed. See record of appeal RR (C) (2C) pp 475–487 and the SSM search on the registered office of PTDP at p 438.

[6] As no appearance was entered by PTDP, a default judgment was entered on 16 March 2014 against PTDP. See p 29 of Vol 2A of the record of appeal. The default judgment was served on PTDP on 24 April 2014. See record of appeal RR (C) (2C) pp 508–509.

[7] PTDP only entered appearance out of time on 12 May 2014 and it was only on 18 March 2015 that PTDP applied to set aside the default judgment.

Before the hearing on 13 May 2015 the then solicitors for PTDP applied for an order to discharge themselves as the solicitors for PTDP and the discharge order was given on 27 April 2015.

[8] When the application came up for hearing on 13 May 2015 the sessions court dismissed the said application to set aside the default judgment.

[9] There was no appeal against the said decision of the sessions court. With no payment forthcoming from PTDP, Raja Qahaar set about trying to realise the fruits of his judgment. He proceeded with a prohibitory order and sale by public auction of six lots of land belonging to PTDP and these were auctioned on 28 March 2016 and 24 June 2016. Only three bidders finally successfully paid the bid price on 17 October 2016 for three lots and the bid price paid was enough to settle the judgment sum outstanding with a balance left for PTDP.

[10] There was a further obstacle placed in the way of Raja Qahaar when PTDP refused to deliver up the three titles to the lots auctioned and it was only after a contempt application had been filed and leave obtained to proceed with contempt against the directors of PTDP that the titles were delivered and indeed a consent order was entered into with the contempt action been discontinued with leave of the court.

PROCEEDINGS IN THE HIGH COURT

[11] Nothing was heard until more than a year later on 7 December 2017 when PTDP as the plaintiff filed this present suit in the High Court at Johor Bahru to impeach the default judgment of 16 March 2014; some three years after from the date the judgment was entered.

[12] Raja Qahaar as the defendant applied successfully in encl 18 for the suit to be struck out under O 18 r 19(1)(a), (1)(b), (1)(c) or (1)(d) of the Rules of Court 2012 ('the ROC 2012').

[13] The plaintiff PTDP appealed to the Court of Appeal and before us, argued that the issue of whether or not the default judgment was procured through suppression of relevant facts or fraud and deceit could only be determined at the trial of the new suit and not summarily by way of striking out.

[14] The parties shall be referred to as PTDP and Raja Qahaar who were the plaintiff and defendant respectively in the High Court impeachment suit.

PRINCIPLES

[15] It is of course trite law that a writ and statement of claim should only be struck out under O 18 r 19 of the Rules of Court 2012 if it is a clear and obvious case that the claim is wholly unsustainable and a complete non-starter. The fact that the plaintiff's claim may be weak is no justification for striking out the claim. See generally the Supreme Court's case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36.

[16] PTDP as the plaintiff/appellant here had also invoked the inherent jurisdiction of the court under O 92 r 4 of the ROC 2012 and s 44 of the Evidence Act 1950 in pursuing this impeachment suit.

Whether the plaintiff's claim is in reality a collateral or back-door attempt to set aside the default judgment

[17] The defendant argued that the current suit in the High Court is nothing short of an unabashed attempt to do that which the plaintiff had failed to do and for which it had not appealed or applied for extension of time to appeal.

[18] If the plaintiff had taken no steps after its then solicitors had applied to discharge themselves, then they cannot come to court after some three years have lapsed to challenge the default judgment by applying to impeach it unless new evidence has been discovered since the application to set aside.

[19] Assuming for a moment that the plaintiff only knew of the default judgment around the time when it entered late appearance on 22 January 2015, it only applied to set aside the default judgment on 18 March 2015; some two months' delay. O 42 r 13 of the ROC 2012 requires an application to set aside the default judgment to be made within 30 days of being served with the default judgment.

[20] There is still the unexplained delay of three years before the fresh writ to impeach the default judgment was filed in the High Court on 7 December 2017.

[21] The reasons given are no different from the ones already harnessed for the purpose of setting aside the default judgment.

[22] If indeed the previous solicitors for the plaintiff had not served the application to discharge on the plaintiff then it is for the plaintiff to bring an action in negligence for the damage that it claimed it now suffers.

A **[23]** The plaintiff cannot be given a second bite at the cherry or to have the same issue being litigated again.

[24] Learned counsel for the plaintiff had invited this court to look at the statement of claim filed by Raja Qahaar in the sessions court and to notice that
B there is nothing pleaded to show privity of contract between Asmah bt Ismail, the person that Raja Qahaar had traced his title to and PTDP in respect of the subject land in Lot Persendirian 667 which was described as Lot 4 of Lot 4648.

[25] However the plaintiff here had accepted the fact that four purchasers by
C the name of Syed Jaffar bin Alwee, Syed Yahya bin Junid, Tengku Othman bin Abdullah and Syed Husain bin Junid ('three Syeds and one Tengku') had earlier entered into a sale and purchase agreement dated 1 June 1967 with a Singapore company Kheng Hup Co Ltd to purchase a 160.125 acres of land held under Certificate No 17421, Lot 4648, Mukim Plentong, Johor Bahru, Johor. The
D said land is now being developed into what is called Taman Saujana.

[26] On 26 July 1967 the three Syeds and one Tengku appointed one Syed Ali bin Mohamed Al-Attas as their attorney by way of a power of attorney dated
E 26 February 1967 with powers to sell, transfer, issue receipts and execute all transfer documents on behalf of the three Syeds and one Tengku for a period of three years from the date of the power of attorney.

[27] According to the plaintiff the said Syed Ali then proceeded to subdivide
F the master titles in Lot 4648 into 800 over subplots and started selling the plots in Lot 4648 to Singaporeans and Johoreans. PTDP accepted the fact that one of the purchasers of the plots from Syed Ali was Asmah bt Ismail (Singapore IC No 0058924) by way of sale and purchase agreement dated 10 December 1967 in record of appeal RR (2G) pp 1274–1277).

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[28] The plaintiff further narrated that it believed the sale and purchase agreement was not completed as the title in the 160 acres land was finally transferred from Kheng Hup Co Ltd to the plaintiff on 18 May 1968; the plaintiff was only incorporated on 23 December 1967.

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[29] Whether or not the plaintiff's version is true was a matter that had to be thrashed out in the trial in the initial suit by calling witnesses but here the plaintiff had disabled itself from doing so by not arguing the setting aside application of the default judgment. Even if it had inadvertently missed that, it
I should have applied for an extension of time to appeal when it discovered that the said setting aside application had been dismissed.

[30] The plaintiff cannot wait for a time convenient for it to then file this separate suit to impeach the judgment of the sessions court when it had sat on

its rights and had not produced any new facts which it had not known when the setting aside application was filed in the sessions court by their previous solicitors.

[31] Neither would the plaintiff be allowed to defend its claim in installments.

[32] Raja Qahaar had on the other hand narrated the fact that the said Asmah bt Ismail had subsequently assigned her right, title and interest in the subject land in Lot 4 of Lot 4648 of the master title to one Raja Mohamed bin Raja Yusof by way of a deed of assignment and power of attorney dated 26 August 1989.

[33] Raja Qahaar further asserted that the assignment was consented to by PTDP as stated in their letter dated 26 June 1989 to Messrs Reginald Vallipuram & Co at record of appeal RR (2G) pp 1270–1271. PTDP further signed on the deed of assignment as indicated in their letter to Messrs Reginald Vallipuram & Co dated 8 August 1989 in record of appeal RR (2G) p 1272. The said Raja Mohamed bin Raja Yusof in turn gave an irrevocable power of attorney dated 6 January 2011 to Raja Qahaar (record of appeal RR (2C) pp 432–436). The subdivision was completed around the year 2000.

[34] Learned counsel for the plaintiff PTDP highlighted the fact that though the recital stated that PTDP is the successor-in-title of the original vendors in the three Syeds and one Tengku, that is not true because PTDP did not buy Lot 4648 from the three Syeds and one Tengku. Instead the plaintiff had bought the land direct from Kheng Hup Co Ltd. However in the letter of PTDP to Messrs Reginald Vallipuram & Co dated 26 June 1989, PTDP had consented to the assignment from Asmah bt Ismail to Raja Mohamed bin Raja Yusof and also confirmed that Asmah bt Ismail had no outstanding payments with them and that 'all outstandings to the company has been settled'. See record of appeal RR (2G) p 1270.

[35] Whether or not that is true would have to be proved by the plaintiff had the trial proceeded in the sessions court but the plaintiff had permitted this opportunity to placidly pass by and it is only after it had suffered the sting of the judgment in the execution process and a possible committal order being issued against its directors that it entered into a settlement agreement with Raja Qahaar as reflected in the consent order recorded by the sessions court judge when the committal proceedings were terminated.

[36] That aside, if Raja Qahaar's pleadings were true, would support his claim for damages seeing that the subject land had been transferred to

A subsequent purchasers. The impeachment proceedings must not be a reinstated opportunity long gone and lost for re-litigating the issue that had arisen and already been disposed of.

B **[37]** Raja Qahaar's assertion of the plaintiff being a successor-in-title to the three Syeds and one Tengku is seen in the fact that their attorney Syed Ali was one of the directors of the plaintiff appointed on 6 May 1968 before the transfer of the master title to the plaintiff from Kheng Hup Co Ltd and he was a director there until 24 April 1978.

C **[38]** The plaintiff had placed itself on record in the affidavit filed with the court below that Syed Ali had misdirected some of the purchasers and so they had commenced the various suits against the plaintiff. It is trite that generally as a director of the plaintiff he would have the power to bind the plaintiff.

D **[39]** We understand that there seem to be some dotted lines between the original owner Kheng Hup Co Ltd and the plaintiff becoming the subsequent registered owner but there is no evidence that the sale and purchase agreement between Kheng Hup Co Ltd and the three Syeds and one Tengku had been E terminated. It may well be a case where the three Syeds and one Tengku had nominated the plaintiff to be the registered owner under their sale and purchase agreement with Kheng Hup Company Ltd. It could also be a case where the three Syeds and one Tengku were promoters of PTDP through their attorney Syed Ali.

F **[40]** Their attorney Syed Ali became a director of the plaintiff before the master title was registered in the plaintiff's name and of course Syed Ali would have knowledge of the individual plots within the master title that had been G sold to individual purchasers like the said Asmah bt Ismail with respect to Lot 29625 and he would owe a fiduciary duty to the plaintiff as its director to draw the plaintiff's attention to the fact that the said plot had been sold to the said Asmah bt Ismail.

H **[41]** The plaintiff said that it had transferred the said subject land to Sri Jaya Hartamas Sdn Bhd on 13 April 2010 which had subsequently transferred the subject land now held under Lot 29625 Geran 316344 Mukim Plentong, Johor Bahru to one Eu Hong Ngo on 5 August 2010.

I **[42]** Perhaps realising that it is too late in the day to pray for a declaration that he is the rightful owner of the subject land and the inability to show that the subsequent purchasers are not bona fide purchasers, Raja Qahaar as plaintiff in the sessions court had only entered judgment for the liquidated sum claimed.

[43] Default judgment was thus entered for the sum of RM844,000 together with interest at the rate of 5%pa from date of writ to realisation and cost of RM1,000.

[44] All we can say is that the case of Raja Qahaar is not altogether too far-fetched and fanciful and doubtless if there is a trial then the witnesses from both sides would be cross-examined as to their credibility. It cannot be overemphasised that the time had come and passed and the plaintiff cannot now, on the ostensible high moral ground of Raja Qahaar having misled the court or suppressed evidence which he knew not to be true, come to court to fight the battle that should have been fought at the point when the plaintiff here in the sessions court below as the defendant, applied to set aside, albeit unsuccessfully, the default judgment.

[45] Indeed Raja Qahaar had immediately lodged a police report as soon as he became aware that the subject land had been transferred to a third party.

[46] In fact the matter had, after judgment been entered, proceeded to the final stage of execution of the judgment and the parties settling at the contempt proceedings that Raja Qahaar had launched to compel the directors of the plaintiff to deliver the titles to the lots belonging to the plaintiff that were being auctioned.

[47] PTDP claimed that the power of attorney dated 6 January 2011 given by Raja Mohamed to Raja Qahaar (record of appeal RR (2C) pp 432–436) is invalid and incapable of conferring any rights on Raja Qahaar because on 6 January 2011 the subject land in Lot 29625 had already been transferred to Sri Jaya Hartamas Sdn Bhd on 13 April 2010 and subsequently to Eu Hong Ngo on 5 August 2010.

[48] That by itself does not mean that Raja Qahaar is concealing from the court any material information or misleading the court. All it means is that Raja Qahaar has been appointed attorney by Raja Mohamed without knowledge that the subject land had been transferred. If indeed the transfer had been in breach of the interest of Raja Mohamed and with that Raja Qahaar, then as in this case, Raja Qahaar, having known of the said transfer to third parties and having no proof that the transferee had been a party to the fraud or misrepresentation, could still settle for, which Raja Qahaar eventually did, damages.

[49] An impeachment suit is not to be launched unadvisedly and more so when there is nothing shown of fraud being practised on the court or that the defendant below in Raja Qahaar had misrepresented and suppressed material facts in any way.

[50] We are not unaware of the dicta in *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 which states as follows:

> (6) The vital point in the whole case was that the respondent actively concealed all the relevant matters from the High Court when it applied for the order of sale. As a litigant moving the court, it was incumbent for the respondent to display uberrimae fides. The respondent having actively practiced a serious deception upon the court ought not to have benefit of the judgment it had obtained.

[51] However this is not a case of active concealment of any material facts or a practice of deceit on the court but rather a case where Raja Qahaar has his version of what happened and PTDP has its version and had the matter gone for trial the sessions court in the initial suit would have to decide whether Raja Qahaar had proved on the balance of probabilities his version or that his version is more probable than that PTDP.

[52] Based on the evidence in the affidavits of the parties, at best each one had a different version as to what happened with respect to the ownership of the subject land and whether the plaintiff had failed in its obligation, if any, to transfer the subject land to Raja Qahaar when the subdivided title had been issued.

[53] The stage to ascertain which of the two versions is right had come and gone and it is too late to re-litigate the issue by resorting to impeaching the default judgment. The ship has sailed and the horse has bolted.

[54] The plaintiff here cannot wait for an opportune time when it is all ready to have its defence and story heard to knock on the doors of the court to want to be heard under a fresh suit to impeach the judgment of a previous court. That would be a backdoor way to resurrect a case that has long been concluded and closed.

[55] This is not a case where new evidence has since been discovered to show that the defendant had misled the court or that fraud had been practised on the court by misrepresenting the facts. The position has not changed in that both sides each have their different stories. The plaintiff PTDP as defendant there had not turned up to argue its case and having had a judgment taken against it and having not set aside nor appealed against such an order, it cannot now be heard, supposedly on the higher ground of impeaching the default judgment.

[56] The Court of Appeal in *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346; [2001] 1 MLRA 98 had addressed precisely this issue of what must be shown before a judgment could be impeached with reference to s 44 of the Evidence Act 1950 which reads:

Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under s 40, 41 or 42, and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion.

[57] The Court of Appeal elucidated and expounded as follows at p 360:

There is a most helpful commentary upon this section in *Evidence, Practice and Procedure* (2nd Ed) by Augustine Paul J. I am indebted to the author of that work for collecting what I think are all the relevant cases touching upon what the section requires before a judgment is impeached for fraud. The position was summarised by Edgar Joseph Jr J (as he then was) in *Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413 at p 418 as follows:

Now 'acts of the highest judicial authority,' though 'not to be impeached from within,' yet 'are impeachable from without,' for 'although it is not permitted to show that the court was mistaken, it may be shewn that they were misled.

Fraud is an extrinsic collateral act; which vitiates the most solemn proceedings of courts of justice'. — per De Gray, CJ in *Duches of Kingston's Case* 2 Smith LC (13th Ed) 644 at p 651. 'Fraud' said Lord Buckmaster 'is an insidious disease, and if clearly proved to have been used so that it might deceive the court, spreads to infect the whole body of the judgment.' — in *Jonesco v Beard* [1930] AC 298 (HL) at p 301.

On the other hand, in the Australian Case of *Price v Stone* [1964] VR 106.

Gillard, J pointed out the necessity of proving a deliberate fraud upon the court as a foundation of this relief, and contrasted this with misleading or erroneous evidence falling short of this requirement.

This last point comes in for emphasis in *Patch v Ward* (1867) 3 Ch App 203 and in the New Zealand Case of *Giffen v Leggatt* [1902] 2 NZLR 427.

[58] The Court of Appeal continued to deal with an example of a situation where a defendant, after judgment had been taken, subsequently challenged by impeaching the judgment when in reality it had by indolence, indifference, omission or negligence failed to marshal all the available evidence at its disposal in the trial of first instance. At pp 360–361 the Court of Appeal explained by way of an example as follows:

In *SP Chengalvaraya v Jagannath* AIR 1994 SC 853 at p 854, the Supreme Court of India dealt with the equipollent provision in the Indian Evidence Act 1872 (which is in pari materia with our s 44). There is a useful passage in the judgment of Kuldip Singh J. It is as follows:

It was up to the defendants, to plead and establish by gathering all the necessary materials, oral and documentary, that the plaintiff had no title to the suit properties. It is their duty to obtain an encumbrance certificate and find out whether the plaintiff had still a subsisting title at the time of the suit. The plaintiff did not prevent the defendants, did not use any contrivance, nor any trick nor any deceit by which the defendants were prevented from raising proper pleas and adducing the necessary evidence. The parties were fighting at arms length and it is the duty of each

to traverse or question the allegations made by the other and to adduce all available evidence regarding the basis of the plaintiff's claim or the defence of the defendants and the truth or falsehood concerning the same. *A party litigant cannot be indifferent and negligent in his duty to place the materials in support of his contention and afterwards seek to show that the case of his opponent was false. The position would be entirely different if a party litigant could establish that in a prior litigation his opponent prevented him by an independent, collateral wrongful act such as keeping his witnesses in wrongful or secret confinement, stealing his documents to prevent him from adducing any evidence, conducting his case by tricks and misrepresentation resulting in his misleading of the court*.

Here, nothing of the kind had happened and the contesting defendants could have easily produced a certified registration copy of Exh B-15 and non-suited the plaintiff; and it is absurd for them to take advantage of or make a point of their own acts of omission or negligence or carelessness in the conduct of their own defence.

The principle then to be culled from the authorities is that a judgment may be impeached for deliberate fraud practised upon the court, and it is insufficient to show that a litigant merely convinced the court through misleading or erroneous evidence. Whether the test has been met in any given case must, I think, depend on the facts and circumstances of the particular case ... (Emphasis added.)

[59] The facts in the present case do not permit PTDP to re-agitate the issue of whether Raja Qahaar had a cause of action against it in the tracing of the ownership to the subject land. All that PTDP had wanted to argue in this impeachment suit should have been raised in the initial suit in the sessions court and Raja Qahaar did not put any obstacle in the path of PTDP to bring its full arsenal of evidence to show that Raja Qahaar had no title to the subject land.

[60] Whether it is a case of PTDP's right to set aside or appeal against the order dismissing the setting aside of the default judgment having expired or that the right had been exhausted, the result is the same. Res judicata has set in as was held by the Federal Court in *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1; [2013] 5 MLRH 175 where it was observed as follows:

[44] We conclude by saying that once a regularly obtained order or judgment has been perfected, the court is functus officio. The matter as decided vide encl 6 is thus res judicata and cannot be re-litigated. It needs to be emphasised that the order made under encl 6 was appealed and affirmed right up to the Federal Court. It cannot now be revisited or reasserted under any guise in a subsequent proceeding. The issues raised by the respondent in encl 29 could have been brought up during the appeal process. The law does not allow the respondent to have a second bite of the cherry and in the manner as it did. This passage from *Tenaga Berhad* explains the rationale:

There was no merit in the appellant's argument that the second application to set aside the default judgment was justified because it was based upon a different

ground from that relied upon in the first application. The doctrine of res judicata in its wider sense was applicable in the present case. It was certainly open to the appellant to ground its first application on the basis that the default judgment was irregular. It was therefore an issue which properly belonged to the first application. But it chose not to rely upon that ground. Once the first application was dismissed, it was not open to the appellant to make a second application to set aside the judgment on a different ground. It would amount to presenting one's case in installment which the law does not permit.

[45] In our judgment too, the re-litigation of a regularly and properly concluded matter as determined by the court is prohibited by the wide doctrine of res judicata. The judicial process rests on the twin pillars of certainty and finality. A final order or a judgment must therefore be vigorously protected by this doctrine, a position taken by the common law courts ever since *Henderson* (1843).

Whether the default judgment obtained is a nullity and as such can be impeached in a separate proceeding

[61] Learned counsel for PTDP had overstated his case that the default judgment obtained was a nullity and in so doing had, with respect, misconstrued the issue.

[62] There is nothing wrong or irregular with the default judgment as assuming that what Raja Qahaar said is true in the initial suit in the sessions court, he would be entitled to judgment. The sessions court had the jurisdiction to grant the judgment as the sum involved is not exceeding RM1 million and further that the subject matter of the dispute is one involving wrongful transfer of the subject land to third parties thereby depriving Raja Qahaar of the subject land (see s 65(1)(b) of the Subordinate Courts Act 1948).

[63] Though Raja Qahaar had initially prayed for a declaration that he is the lawful owner of the subject land and for damages to be assessed, he had when entering default judgment abandoned those two prayers. The final prayer pursued was recorded was for a liquidated claim only and interest and cost. See record of appeal RR (C) (2C) p 507.

[64] We agree with learned counsel for Raja Qahaar that O 13 r 6(1) of the ROC 2012 does not apply here based on the Court of Appeal's decision in *Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 5 MLJ 112; [2008] 1 MLRA 276 as follows:

[32] During the hearing of this appeal, the second to sixth defendants' counsel submitted that the judgment in default is void ex debito justitiae for failing to comply with O 13 r 6(1) of the RHC. He elaborated that since the plaintiffs' action contains claims of a description not mentioned in r 1 to 4 of O 13 r 6(1) of the RHC, the plaintiffs cannot enter judgment in default even though the defendants had failed to enter appearance. The plaintiffs were required to 'proceed with the

action as if that defendant had entered an appearance'. He then stressed that the plaintiffs should not have entered default judgment against these defendants but to set down the action on motion for judgment. He cited to us the Supreme Court case of *Lam Kong Co Ltd v Thong Guan Co (Pte) Ltd* [1985] 2 MLJ 429 and the Federal Court case of *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565.

[33] Order 13 r 6(1) of the RHC states:

> Where a writ is endorsed with a claim of a description not mentioned in rr 1 to 4, then, if any defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing and upon filing an affidavit proving due service of the writ on that defendant and, where the statement of claim was not indorsed on or served with the writ, upon serving a statement of claim on him, proceed with the action as if that defendant had entered an appearance.

[34] The rational for this is explained in the judgment of Gopal Sri Ram in *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor*:

> The philosophy underlying O 13 r 6(1) of the RHC is that specific relief is, by its very nature, discretionary. A defendant may well decide not to defend an action in which such relief is claimed in the honest belief that he has no defence upon question of liability. But that does not relieve the plaintiff from delivering his statement of claim and satisfying the court, upon a motion for judgment, that the case is a fit one for the grant of specific relief.

[35] As a refresher, r 1 of O 13 of the RHC refers to claim for liquidated and r 4 is claim for possession of immovable property. A quick reference to the reliefs sought by the plaintiffs in their statement of claim will immediately reveal that prayer 1 is for accounts; prayer 2 is associated with the first since it is a request for payments of money found due in the accounts; prayer 3 for a declaration; prayer 4 for unliquidated damages for breach of contract, breach of trust, and breach of fiduciary duty. After these, are general claims for interest and costs. From these, it is certain that prayers 1 to 3 are not within rr 1 to 4 of O 13 of the RHC. In fact, the *Supreme Court Practice*, Malaysian Edition (1996 Reprint of 1979 Edition) adopting the English White Book declared at para 13/6/1 that if 'there is endorsement on the writ a claim for an account, injunction, specific performance, declaration or rectification or other remedy or relief which falls outside the descriptions specified in rr 1– 4, the plaintiff cannot enter judgment in default of appearance, *unless he expressly and finally abandons every such remedy or relief.* (Emphasis added.)

[36] Arguing against this contention, the plaintiffs brought to our attention that they had abandoned their claims for accounts and declaration. They had elected to limit their claim or confine it to only that falling within O 13 r 2 of the RHC. This can be seen from the contents of the judgment in default; it is only for unliquidated damages to be assessed and costs. This is well within the rules for judgment in default to be entered without the need for motion. The claim for accounts and declaration were dropped.

[37] Indeed, according to the English White Book of 1995 under O 13 r 6(1) of the Rules of the Supreme Court 1965:

> The effect of para (1) is to preclude a plaintiff from entering judgment in default

of notice of intention to defend in every case in which the indorsement on the writ contains or includes a claim which is not squarely within rr 1 to 4 of this Order, and to require him to proceed with the action as if that defendant had given notice of intention to defend. If, therefore, there is indorsed on the writ a claim for account, injunction, specific performance, declaration or rectification or other remedy or relief which falls outside the descriptions specified in rr 1–4, the plaintiff cannot enter judgment in default of notice of intention to defend, unless he expressly and finally abandons every such remedy or relief. On the other hand, the plaintiff is free to elect which relief he wants to pursue and he is under no duty to give prior notice of his election to abandon any form or relief which he originally claimed and on the effective abandonment of every remedy or relief outside the descriptions specified in rr 1–4 he is entitled to enter a default judgment under these rules (*Morley London Developments Ltd v Rightside Properties Ltd* [1973] 117 SJ 876). (Emphasis added).

[65] Learned counsel for PTDP quoted the proposition of law laid down in the Federal Court case of *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 at pp 384–385 which held as follows:

The fifth point I should like to deal with concerns the contention by counsel for the chargees that the chargors' application by way of summons in chambers to set aside the ex parte orders, dated 13 November 1992, had not been made within a reasonable time as the ex parte orders had been made some ten months previously, that is to say, on 29 January 1992.

In my view, *lapse of time is no bar to a defendant's application to set aside a judgment which is a nullity*. (See *Atwood v Chichester* (1878) 3 QBD 722). I am further supported in this by the following passage in a very recent judgment of the Federal Court in *Tuan Hj Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 at p 42:

... it is clear law that the court still retains a discretion to set aside an irregular judgment despite long delay, provided it is satisfied that:

(a) no one has suffered prejudice by reason of the defendant's delay.

(b) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or

(c) to let the judgment stand would constitute oppression (see *Atwood v Chichester* (1878) 3 QBD 722; *Harley v Samson* (1914) 30 TLRL 450. (Emphasis added.)

[66] In the above case no notice of adjourned hearing of the order for sale was given to the chargors who were unrepresented and so at the adjourned hearing date for the order for sale, an ex-parte order for sale was granted.

[67] The above is not one on impeachment of a court's judgment but rather a case where the judgment of the court was a nullity and hence a lapse of time is no bar to set aside the judgment that was a nullity. The case of *Choo Pok Choy*

was one where the High Court order sought to be impeached was a nullity as the charge of the land was one under a land office title over which the land office and not the High Court had exclusive jurisdiction to make an order of sale.

[68] So too was the order for sale that was sought to be set aside in *Badiaddin v Arab-Malaysian Finance Bhd* [1998] 1 MLJ 393. The third party charge there which was over Malay reservation land was null and void under the Malay Reservations Enactment (FMS Cap 142) ('the Enactment'), and as such the dealing in the said land was illegal and no valid charge could have been created against an express prohibition under the Enactment. In the present case PTDP had applied to set aside the default judgment though much time had lapsed but they failed to set aside the said judgment. They had every right to appeal but they had not exercised it and that right had expired.

[69] There is nothing oppressive in letting the default judgment remained as PTDP had not bothered to pursue further with the appeal or apply for extension of time to file the appeal and was only propelled into action because of the execution effected by way of a prohibitory order and a writ of seizure and sale after PTDP had refused to pay.

[70] The instant case is not one where the sessions court had no jurisdiction or that the transaction in the subject land was prohibited by statute.

[71] A few cases involving PTDP had come before the courts and though the findings had not been consistent depending on the particular and peculiar facts of each case, nevertheless the factual matrix and the master title is the same with the first purchasers having bought their subject land from three Syeds and one Tengku and the master title was finally transferred to PTDP and then PTDP had subsequently transferred it to some third parties and not the purchaser who had bought from the first purchaser.

[72] One such case that had reached the Court of Appeal is the case of *Supreme Envy Sdn Bhd v Abul Rahim bin Sinon (suing and acting as personal representative and representing the estate of Sinon bin Karnen, the deceased) & Anor* [2017] 1 MLJ 43; [2016] 1 LNS 1535.

[73] The instant case is even more straight forward as Raja Qahaar finally decided not to challenge the registered title of the subsequent purchaser that had derived titled from PTDP but damages for the wrongful transfer in complete disregard of the interest of Raja Qahaar.

[74] In *Supreme Envy*'s case the High Court had held that PTDP was a constructive trustee of the plaintiff there and that there was a breach of trust

such that the victim of the breach of trust would be able to trace the trust property which had gone into the hands of a purchaser who is not bona fide for value.

[75] The High Court found that *Supreme Envy* was not a bona fide purchaser for value without notice. See *Abdul Rahim bin Sinon v Pembangunan Tanah dan Perumahan Sdn Bhd and Anor* [2016] 1 LNS 1079.

[76] The Court of Appeal in the *Supreme Envy* case affirmed the decision of the High Court that had set aside the transfer from PTDP to Supreme Envy and had ordered that the transfer be made to Abdul Rahim bin Sinon as a personal representative of the estate of the deceased Sinon bin Karnen, deceased.

Whether the plaintiff PTDP is estopped after having entered into a consent order following the contempt action brought by Raja Qahaar from now proceeding with this new impeachment suit

[77] As stated, when PTDP refused to deliver up the titles to the land seized for the purpose of the execution, Raja Qahaar proceeded with a contempt action against two of its directors. Leave was granted for the contempt action and PTDP filed two applications to strike out the ex-parte leave application as well as to set aside the ex-parte leave order. Affidavits were filed by both sides and both parties subsequently recorded a consent order dated 31 July 2017 record of appeal RR (C)(2E) pp 841–844 containing the following terms:

(a) the appellant consented to deliver the original document of titles for the lots to be auctioned within seven days from the date of the order;

(b) the appellant to deliver Form 19H for withdrawing the private caveat entered against one of the titles to be auctioned;

(c) the excess sum of RM268,845.67 shall be refunded to the appellant;

(d) the respondent shall pay the appellant the assessment and quit rent already paid by the appellant of RM1,604.50;

(e) the respondent shall withdraw his application in encl 34 for leave for contempt with no order as to cost and no liberty to file afresh; and

(f) the appellant shall withdraw its application in encl 38 for striking out the leave application and encl 40 for setting aside the leave order granted with no order as to cost and with no liberty to file afresh.

[78] There was no reservation and preservation of rights with respect to the rights of PTDP to file a fresh suit to impeach the default judgment which would have the effect of nullifying not only the default judgment but also the consent order recorded in the contempt action. Hardly had the ink in the

consent order dried when PTDP filed yet another application to set aside the consent order of 31 July 2017. See record of appeal RR (C) (2F) at pp 957–959.

[79] The application of PTDP in encl 52 was dismissed on 28 November 2017 and there was no appeal against the said decision.

[80] It was only then that PTDP commenced this collateral proceeding in the High Court of Malaya in Johor Bahru on 31 October 2017.

[81] Such a contumelious conduct of the plaintiff here in PTDP cannot be condoned and indeed, has to be censured in the strongest terms. After having failed to set aside the default judgment with no appeal therefrom and having failed to set aside the consent order in the committal proceeding, the plaintiff PTDP is trying its luck on the supposedly higher ground of impeaching the default judgment of Raja Qahaar in that had the matter proceeded to trial in the sessions court, the truth would emerge that Raja Qahaar had concealed material facts from the court as to mislead the court into entering the default judgment.

[82] Whilst tenacity and perseverance is a virtue, it becomes toxic and an abuse of the court's process in the face of repeated resurrecting of the same matter that had been finally concluded with no appeal from PTDP. There must be an end to all litigation involving the same issue either because the affected party had not exercised its right of appeal or that it has exhausted all avenues of setting aside the impugned judgment or subsequent consent order.

[83] It is no longer the virtue of endurance but the egregious exercise in futility of flogging a dead horse and abusing the process of the court! It is in that context as evidenced by the chronology of events recounted above that PTDP must be barred from breathing to life once again that which is long dead and interned. The plaintiff PTDP is estopped from filing a fresh proceeding on the ground of impeaching the judgment of the sessions court when there is no reference to any fresh evidence discovered after the judgment had been entered which would in some ways point towards the fact that the sessions courts could have been misled and that deceit had been practised upon the court.

[84] What stands out like a sore thumb is the repeated if not recalcitrant conduct of PTDP in filing fresh applications and even this fresh suit each time it is unhappy with the decision of the court rather than exercising and exhausting its right of appeal.

[85] The law does not allow a litigant repeated bites on the cherry in instigating the same issue long lost and concluded with the recording of the consent order in the contempt proceeding including a refund to the plaintiff PTDP the excess sum after paying the sum as stated in the default judgment.

[86] Any irregularities in the recording of the default judgment, which PTDP had not shown, have been cured and both rectified and ratified by the parties with the consent order recorded in the contempt proceeding without PTDP reserving their rights to litigate further.

[87] If PTDP had wanted to litigate further it should have made this known clearly to Raja Qahaar in which case proper instructions may be taken as to whether to enter into the consent order and terminate the contempt proceeding with leave ofcourt and with no liberty to file a fresh contempt action based on the same facts or to let the court decide on the merits of the contempt application.

[88] The learned judicial commissioner was constrained to strike out ptdp's claim for to allow it to continue would be a clear abuse of the court's process (see *Hadi bin Hassan v Suria Records Sdn Bhd & Ors* [2005] 3 MLJ 522; [2004] 8 CLJ 225).

[89] This is not a case where the court by striking out the impeachment suit is making a final determination on what appears to be conflicting versions of ownership and title on mere affidavit evidence alone, but rather one where the plaintiff's claim is a complete non-starter; a spurious strategy to keep a suit alive when the last traces of life has long been snuffed out and should be left to lie interned — ingrained no doubt in the judgments and orders of the courts as a testimony to the price of indolence in pursuing one's claim and exercising one's right.

PRONOUNCEMENT

[90] Having carefully considered all the arguments advanced by learned counsel for the appellant/plaintiff, we were unanimous in finding no merits in this appeal and that the decision of the High Court in striking out the plaintiff's writ and statement of claim was upheld and affirmed. We ordered costs of RM10,000 to be paid by the plaintiff/appellant to the defendant/respondent subject to payment of allocator.

Appeal dismissed with costs of RM10,000.

Reported by Kohila Nesan